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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME GARLIT,

Defendant and Appellant.

H042218

(Santa Clara County
Super. Ct. No. C1482198)

I. INTRODUCTION

A jury convicted defendant Jerome Garlit of attempted first degree burglary (Pen. Code, §§ 664/459/460, subd. (a))¹ and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). The trial court found true allegations that defendant had served two prior prison terms, and it sentenced defendant to a four-year prison term.

On appeal, defendant contends there was insufficient evidence to support his attempted first degree burglary conviction, which was prosecuted on the theory that he attempted to enter a residence with the intent to commit theft. For reasons that we will explain, we will affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

II. BACKGROUND

A. *Testimony of Thanh Ly*

On April 29, 2014, Thanh Ly was home alone in the kitchen of her house, located on Sun Lane in San Jose. Her husband and children had left the house at about 8:15 a.m. that morning. At about 8:55 a.m., Ly heard her small dog, who was in a pen in the kitchen, barking “very severely.” Ly then heard someone was opening the screen door at the front of her house, which was in front of a locked wooden door.

Ly went into the living room and saw defendant outside a window. The blinds on the window were down, but partially open, so Ly could see through them. Defendant was trying to open the window, which was locked. After shaking the window several times, defendant walked over to the fence that led to Ly’s backyard and looked over it. As defendant began to climb over the fence, Ly pulled open the window blinds and banged on the glass. Defendant did not initially respond, but he eventually looked over, saw Ly in the window, and ran away. Defendant was wearing a hooded sweatshirt at the time, with the hood pulled up onto his head over a baseball cap. As he ran away, Ly called her next-door neighbor, Hai Bui. Ly told Bui what she had seen and suggested he go outside and look around.

After her call to Bui, Ly saw defendant come running back towards her house. After defendant ran past her house, Ly went outside and saw James Davidson, who lived across the street. Ly told Davidson what had happened, then went back into her house and called 9-1-1. Ly told the dispatcher that someone “was knocking uh, tried to open my door.”² Ly also reported that defendant tried to open her window. She described defendant’s features and clothing.

² At trial, Ly clarified that when she initially stated that defendant had been “knocking,” she had misspoken. Defendant did not knock or ring the doorbell.

Police officers arrived at Ly's house within five minutes. Ly accompanied an officer to a location a few blocks away, where she identified defendant.

B. Testimony of Neighbors

Yuehong Xio lived next door to Ly. She had surveillance cameras around her house that constantly recorded. Surveillance video showed defendant walk up to the fence in Xio's front yard, look over, and then leave, shortly after he left Ly's house.

Bui testified that when Ly called him, she reported that someone had banged on her door and her windows, then walked around the fence in an attempt to enter her house. Bui went outside and saw Davidson talking to defendant on the sidewalk. Defendant was no longer wearing a sweatshirt. After a short conversation with Davidson, defendant walked down the street, carrying a backpack.

Davidson testified that when he left his house at about 9:00 a.m. on April 29, 2014, he saw defendant try to climb up Xio's fence and throw something on the ground. Davidson decided to go talk to defendant to see what was going on. When Davidson asked defendant what he was doing, defendant got off the fence quickly. Defendant "started saying nonsensical things." Davidson went back across the street to his house, and defendant followed him. Davidson again asked defendant what he was doing. Defendant said something like, "It's okay," explaining that his cousin lived there. Davidson said, "You don't have a relative here," and defendant admitted, "Oh you're right." Defendant, who was sweating and "acting like he was out of breath," then claimed he had just run a long way. Davidson said, "No, you didn't," and defendant admitted, "Oh, you're right." Defendant continued to proffer reasons for his presence, and Davidson continued to reject defendant's claims. Davidson finally told defendant to leave, and defendant agreed, promising to never return. Defendant then went down the sidewalk, picked up the item that he had dropped earlier, which appeared to be a backpack, walked down the street, then stopped under a tree at the corner.

C. Investigation

San Jose Police Officer Manuel Rodriguez was dispatched to Ly's residence. He spoke with Ly, who was visibly shaken. Officer Rodriguez looked around the house. He found no damage on the screen door or window and no fingerprints.

San Jose Police Officer Mike Nascimento drove around the area, looking for a person who matched the description Ly had provided. He saw defendant, who matched the description, on a sidewalk, waiting for cars to pass, and then saw defendant run across the street. Officer Nascimento detained defendant, who was holding a bag. Defendant followed the officer's command to get on the ground. Officer Nascimento could tell that defendant was under the influence of a controlled substance. Defendant was fidgety, his eyelids fluttered, his pupils were dilated, he had a dry mouth, his speech was rapid, and he was sweating. However, defendant was responsive to questions and was not confused, and his symptoms were not so severe as to warrant a call for assistance. After the in-field showup, where defendant was identified by Ly, defendant was taken into custody, where a urine sample was collected.

Criminologist Ghazaleh Moayer testified as an expert in the analysis and identification of drugs in samples and in the effects of drugs, especially methamphetamine, on the human body. Someone using methamphetamine will generally exhibit hyperactivity, agitation, a high pulse rate and respiration rate, dry mouth, fluttering eyelids, and dilated pupils. Methamphetamine can increase risk-taking and cause someone to speak quickly. A very high amount can cause hallucinations. A test of defendant's urine confirmed that methamphetamine was in his system.

D. Defense Case

Defendant did not testify or present any witnesses on his behalf. During argument to the jury, defendant's trial counsel asserted that it would be speculative to find that defendant intended to commit theft. Defendant's trial counsel pointed out that there were no signs of forced entry into the house, no getaway driver, and no burglary tools. The

incident occurred at 9:00 a.m. in a neighborhood where several people were at home, and at a house with a barking dog. Defendant did not run when Davidson confronted him; he stayed and talked to Davidson. Defendant was under the influence of methamphetamine, which can cause hallucinations and odd behavior. It was reasonable to find that defendant was merely looking into windows.

The prosecutor argued that defendant's intent to commit theft was shown by circumstantial evidence. Defendant attempted to enter the house at a time when most people are at work. Defendant had a hood and hat on his head, and he was carrying a backpack, in which he could put items he planned to take from the house. Defendant did not knock on the door or ring the doorbell but instead tried to enter through the front door and then a window and then the back yard. Defendant looked over the fence at Xio's house after his unsuccessful attempts to enter Ly's house. Defendant quickly left Ly's house after finding out she was home. Defendant removed his sweatshirt in order not to be identified. Defendant promised to never return and left the neighborhood. Defendant made false statements to Davidson about visiting his cousin and having been running a long way, which showed a consciousness of guilt.

E. Jury Questions

During deliberations, the jury submitted seven notes. The first four notes asked questions indicating the jury was attempting to determine whether defendant entered a building. The trial court explained that while entry into a building was an element of burglary, it was not an element of attempted burglary.

The fifth jury note asked, "Is the act of attempting to enter another's home without permission enough to show intent to commit burglary?" The trial court referred the jury to CALCRIM No. 460 (attempted burglary) and to CALCRIM No. 1700 (burglary), which told the jury that the elements of burglary were "[t]he defendant entered a building" and "[w]hen he entered a building, he intended to commit theft."

The sixth jury note pointed out that CALCRIM No. 1700 did not define “ ‘intended to commit theft’ ” and asked, “Can we get further explanation of how to define ‘intent’?” The trial court referred the jury to a portion of CALCRIM No. 200, which stated that “[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings,” and to a portion of CALCRIM No. 252, which stated that attempted burglary required a “specific intent.” The sixth jury note also asked, “[CALCRIM No.] 1700 says ‘please refer to the sep[a]rate instructions that I will give you on those crimes’ – which section should we reference[?]” The trial court responded, “That portion of [CALCRIM No.] 1700 is referring to [CALCRIM No.] 1800 [defining theft].”

The seventh jury note asked for Davidson’s testimony.

F. Convictions and Sentence

The jury convicted defendant of attempted first degree burglary (§§ 664/459/460, subd. (a)) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). The trial court found true allegations that defendant had served two prior prison terms, and it sentenced defendant to a four-year prison term.

III. DISCUSSION

Defendant contends there was insufficient evidence to support his attempted first degree burglary conviction. He argues there was no direct or circumstantial evidence that he attempted to enter Ly’s residence with the intent to commit theft.

A. Standard of Review

“The law we apply in assessing a claim of sufficiency of the evidence is well established: ‘ ‘ ‘[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ’ ’ [Citation.] The

standard is the same under the state and federal due process clauses. [Citation.] ‘We presume “ ‘in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] This standard applies whether direct or circumstantial evidence is involved.” [Citation.]’ [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294 (*Gonzales and Soliz*).)

B. Analysis

The existence of a defendant’s intent to commit theft at the time of an entry or attempted entry is “ ‘rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence.” [Citation.]’ [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 669-670.) The “defendant’s conduct during and after his [or her] entry” is a relevant circumstance. (*Id.* at p. 670.) For instance, the jury may conclude that an entry or attempted entry was done with the intent to commit theft based on “flight after being hailed by an occupant of the building [citation], the fact that the building was entered through a window [citation] or through a doorway which previously had been locked [citations] without reasonable explanation of the entry.” (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786-787.)

In this case, defendant attempted to enter Ly’s home twice: first through the front door, and then through the window. He attempted the entries after Ly’s husband and children had left the house. Defendant’s head was covered with a hat and a hood, indicating he wished to avoid being identified. Defendant had a backpack, which could be used to carry items from the house. Defendant fled from Ly’s yard after Ly knocked on the window. Defendant looked at another neighbor’s house after his unsuccessful attempts to enter Ly’s house, indicating he had not abandoned his intent to commit a theft. And finally, defendant made false statements about his intent to Davidson, and then fled from the neighborhood, promising never to return. Taken together, a reasonable trier of fact could find beyond a reasonable doubt that defendant intended to commit theft

at the time he attempted to enter Ly's house. (See *Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 294.)

Defendant sets forth alternative explanations for each fact relied upon by the prosecutor below. For instance, he asserts that his attempted entries into Ly's house could have been the result of the "bizarre behavior" caused by his methamphetamine use. Defendant points out that he attempted to enter the house while the dog was barking and while Ly was watching him through the window, and he asserts that someone with the intent to commit theft would not have done so. However, the jury could have found that defendant did not hear the dog barking or see Ly. Ly testified that the dog, who was in the kitchen, could not be heard well from outside the house. The record also indicates that the window blinds were down and that Ly saw defendant by looking through them at an angle. Likewise, although defendant did not immediately react when Ly knocked on the window, Ly testified that the windows had double-paned glass, which might have reduced the sound of her knocking.

Defendant also argues alternative explanations and conclusions for other facts relied upon by the prosecutor below, including his flight after noticing Ly, his carrying of the backpack, his wearing of the hooded sweatshirt, his removal of the sweatshirt, his act of looking over Xio's fence, and his false statements to Davidson. Even assuming these facts could support a finding that defendant did not intend to commit theft when he attempted to enter Ly's house, the existence of an alternative conclusion does not require reversal on appeal. " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]' [Citation.]" (*People v. Thomas* (1992)

2 Cal.4th 489, 514.) Here, as explained above, the circumstances reasonably justify the jury's finding that defendant had the intent to commit theft when he attempted to enter Ly's house.

Defendant's reliance on a federal case, *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, is misplaced. In that case, the Ninth Circuit found insufficient evidence to sustain a juvenile delinquency petition for first-degree murder and attempted first-degree murder based on aiding and abetting principles. Specifically, there was insufficient evidence that the minor knew his brother planned to commit first-degree murders and insufficient evidence that the minor "acted in a way intended to encourage or facilitate these killings." (*Id.* at p. 1277.) Although the minor had fled after the shootings and had made false statements about the shootings, these facts did not show he knew his brother planned to commit the shootings beforehand. (*Id.* at pp. 1277-1278.) Additionally, although the minor was present during the shootings, he "did not do or say anything before, during or after the shootings from which a reasonable factfinder could infer an intent or purpose to aid and abet" his brother. (*Id.* at pp. 1278-1279.) Only "speculation" could support such findings. (*Id.* at p. 1279.)

Here, defendant did much more than simply stand by while another person committed a crime. Defendant himself engaged in numerous actions that supported a reasonable inference that he attempted to enter Ly's home with the intent to commit theft. Considering defendant's attempts to enter Ly's home through her front door and windows, at a time when she was alone in the house, while wearing a sweatshirt hood and cap over his head and carrying a backpack, as well as his flight from the scene, false statements to Davidson, and flight from the neighborhood, it was not merely speculative that he intended to commit theft at the time of his attempted entries.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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